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No. 83-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF TEXAS,

Appellant,

v.

KVUE-TV, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE

The National Association of Broadcasters (NAB) is a nonprofit incorporated association of radio and television broadcast stations and networks. As of November 16, 1983, NAB's membership included 4,387 radio stations and 700 television stations, some of which are located in Texas, and the major national commercial broadcast networks.

NAB's membership has a clear stake in the outcome of this litigation. Broadcasters are subject to comprehensive

regulation in the area of political advertising under Section 315(b) of the Communications Act of 1934.[1] The State regulation at issue here, Article 14.09(B) of the Texas Election Code,[2] conflicts substantially with the federal rate regulation statute. Whereas the federal law requires broadcasters to provide their lowest unit rates to legally qualified candidates during an election period, the Texas statute makes the lowest unit rate available year-round to "political issue" advertisers as well as to candidates. Moreover, the Texas statute conflicts with the Congressional purposes underlying the federal law.

If Article 14.09(B) is permitted to stand, Texas broadcasters would then be subject to conflicting regulations, and consequently would be less able to fulfill their public interest obligations.

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief amicus curiae.

I. THE TEXAS STATUTE PRESCRIBING RATES FOR POLITICAL ADVERTISING ON BROADCAST STATIONS CONFLICTS WITH BOTH THE LETTER AND UNDERLYING PURPOSES OF THE FEDERAL RATE REGULATION STATUTE AND IS THEREFORE PREEMPTED.

Appellant argues that Congress did not intend the lowest unit rate provisions of Section 315(b) of the Communications Act[3] to preempt state regulation of political broadcast rates. This claim was soundly dismissed by the Court of Appeals for the Fifth Circuit. The Court of Appeals found implied preemption, on the basis

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[1] Communications Act of 1934, as amended, 47 U.S.C. § 315(b) (1972).

[2] Tex. Elec. Code art. 14.09(B).

[3] 47 U.S.C. § 315(b).

that Article 14.09(B) of the Texas Election Code "stands as an obstacle to the achievement of Congress' purpose in enacting the rate regulation statute." [4]

As the Court of Appeals recognized, Congress' purpose in enacting section 315(b) was twofold. First, Congress sought to provide candidates for public office with better access to the broadcast media in order to "more fully and completely inform" the electorate.[5] Second, Congress sought to limit the "spiraling cost" of campaigning.[6] Indeed, Congress purposefully limited the availability of the lowest unit rate in order to create an "incentive to candidates to shorten the duration of their campaigns, thereby helping to reduce campaign costs." [7]

The court below correctly found that the Texas statute conflicts with these Congressional goals. By making the lowest unit rate a year-round rule, Article 14.09(B) lengthens campaign periods and encourages "greater rather than lesser spending." [8] In addition, by requiring broadcast stations to effectively subsidize the lengthy media campaigns of purchasers of "political issue" advertising as well as of candidates, Article 14.09(B) creates a disincentive to the sale of broadcast time for political advertising. In turn, the Texas statute both restricts the viability of broadcasting as a forum for robust discussion of political issues, and impedes rather than promotes the access of candidates to the broadcast media.

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[4] *KVUE-TV, Inc. v. Moore*, 709 F.2d 922, 936 (5th Cir. 1983). *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

[5] S. Rep. No. 96, 92d Cong., 2d Sess. ——, *reprinted in*, 1972 U.S. Code Cong. & Ad. News 1773, 1774.

[6] *Id.* at 1781.

[7] *Id.*

[8] 709 F.2d at 936.

This Court has consistently held that:

> [W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs to be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.[9]

Because the Texas statute stands as an obstacle to the accomplishment and execution of the purposes underlying a valid federal regulation, this Court must affirm the Fifth Circuit's finding of preemption.

An additional ground on which to affirm the court below is that section 315(b) "is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[10] The pervasiveness of section 315(b) is manifest in the precision with which it addresses each aspect of political advertising rates. To begin with, section 315(b) is explicit as to whom it applies, namely, "any person who is a legally qualified candidate for *any* public office in connection with his campaign."[11] The language of the statute does not state or imply that broadcast stations should be burdened with the requirement that they afford their lowest unit rate to advertisers of "political issues." The statutory language makes it clear that section 315(b) applies to legally qualified candidates for state and local offices as well as for federal offices.

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[9] *Savage v. Jones*, 225 U.S. 501, 533 (1911). *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1940).

[10] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230 (1946).

[11] 47 U.S.C. § 315(b) (emphasis added).

In addition to being explicit as to whom it applies, section 315(b) is express as to when broadcast stations must afford their lowest unit rate to candidates—*i.e.*, "during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election." [12] At all other times broadcasters may set their political advertising rates as high as the rates that they have established for "comparable use(s)" of their stations.[13]

In sum, section 315(b) is a comprehensive federal statute, governing the entire area of rate regulation. For that reason the concurrent Texas regulatory scheme is preempted.

Finally, Appellant maintains that the Texas statute does not conflict with Section 315(b) but rather that it "coordinates beautifully" with the federal law.[14] That argument is clearly erroneous. The Texas statute conflicts both with the purposes underlying Section 315(b) and with Congress' intent as to the applicability of that provision. Even assuming arguendo that the two regulatory schemes shared the same goals, as Appellant asserts that they do, Article 14.09(B) would have to yield to the federal rate regulation. This Court has stated:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.[15]

Here, the federal supervision of political advertising rate regulation would be critically undermined if both the federal and state laws were enforced. Thus the Texas regulation must give way to Section 315(b).

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[12] 47 U.S.C. § 315(b)(1).

[13] 47 U.S.C. § 315(b)(2).

[14] Brief for Appellant at 13.

[15] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

II. THE UNIFORM FEDERAL REGULATION OF POLITICAL ADVERTISING RATES DOES NOT PRECLUDE TEXAS FROM EXERCISING ITS RESERVED POWERS UNDER THE TENTH AMENDMENT AND THEREFORE THE TENTH AMENDMENT IS NOT A DEFENSE TO A FINDING OF PREEMPTION.

Appellant argues that the power to set political advertising rates applicable to state and local candidates is reserved to the states under the Tenth Amendment, and that this power cannot be preempted by federal law.[16] One of the two cases cited by Appellant in support of this argument is *National League of Cities v. Usery*,[17] in which this Court stated that "Congress may not exercise [its] power so as to force directly upon the state its choices as to how essential decisions regarding the conduct of integral governmental affairs are to be made." [18]

What Appellant fails to point out, however, is that the *National League of Cities* opinion carefully distinguished between federal legislation that "directly displaces the states' freedom to structure integral operations in areas of traditional governmental functions," [19] and federal laws which regulate private enterprises such as broadcast stations:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the Nation and of the state in which they reside. It is quite another to uphold a similar exercise of Congressional authority directed not to private citizens but to the States as states.[20]

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[16] Brief of Appellant at 8.

[17] 426 U.S. 833 (1976).

[18] *Id.* at 855.

[19] *Id.* at 852.

[20] *Id.* at 845.

In *National League of Cities*, this Court invalidated the 1970 amendments to the Fair Labor Standards Act, a regulatory scheme far more obtrusive than section 315(b). The amendments would have extended federal minimum wage and maximum hour standards to state and local government employees, thereby displacing directly the judgments of the states and of their political subdivisions as to how their respective coffers should be spent.

By contrast, section 315(b) does not substitute the judgment of Congress for that of state and local governments in an area traditionally regulated by the States. Section 315(b) imposes standards on private businesses in effectuation of Congress' legitimate interest in ensuring that broadcast stations operate in the public interest. It is clear that the instant case does not fall within the ambit of *National League of Cities*.

The other case cited by Appellant, *Oregon v. Mitchell*,[21] is equally unavailing to Appellant's argument. In *Oregon*, this Court invalidated the Voting Rights Act Amendments of 1970 to the extent that they would have lowered the voting age from 21 to 18 in state and local elections. The narrow ruling of *Oregon* was that the power to establish voter qualifications in state and local elections belongs to the States under the Tenth Amendment except to the extent that that power has been specifically limited by amendments to the United States Constitution. Since the instant case does not involve federal usurpation of Texas' power to establish its own voter qualifications, *Oregon* is not controlling here.

Appellant can point to no case decided by this Court which requires the finding that the regulation of political advertising rates is an "integral governmental function" of the States. Moreover, Appellant points to no decision in which this Court has denied the preemptive effect of

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[21] 400 U.S. 112 (1970).

a valid federal law that did not directly displace a state from the exercise of one of its reserved powers.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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